FILED
FEB 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No 06-1118

In the Supreme Court of the United States

Pravin D. Patel; Aruna P. Patel; Sanjay Patel; Harivandan P. Patel; Hansa Patel; Amrut N. Patel; Sita Patel; Jayesh Patel; Suresh Patel; Mahesh Patel; Bhavabhai Patel; Vibhakar B. Patel; Markan Thakar; Chandravadan K. P. Shastri; Pushpa C. Shastri; Vijay K. Shastri; Bhagwatiben V. Shastri; Rajendra Shastri; Annita Shastri,

Petitioners,

v.

City of San Bernardino, a Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

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I

SUMMARY OF ARGUMENT

Petitioners recently lost a case in the Ninth Circuit. They now ask this Court to review, not the recent Ninth Circuit decision, but a 2002 decision of the Ninth Circuit. The 2002 decision held that federal courts lack jurisdiction to entertain requests for refunds of local taxes when the taxes have been held invalid, because the procedure for seeking a refund is provided by readily available state law procedures.

The petition should be denied because:

1. The petition is moot and petitioners lack standing to sue. After the 2002 Ninth Circuit opinion was entered, a California court entered a judgment, which a California court of appeal affirmed, that petitioners never paid any taxes and thus there were no taxes which could possibly be refunded. It is entirely irrelevant what remedies should exist for taxpayers who actually paid taxes and want a refund.

2. Although this Court has discretion to hear issues decided in a prior appeal in the process of complete resolution of a case, this petition is limited solely to the 2002 Ninth Circuit opinion. No extraordinary reasons merit review of a decision from five years ago.

3. The 2002 Ninth Circuit decision was correct.

4. There are no conflicts among the lower courts and no issues of nationwide importance this Court needs to resolve.

II

THE TAX AT ISSUE AND THE HISTORY OF LITIGATION CONCERNING IT

The City of San Bernardino imposes a tax on hotel guests equal to ten percent of the cost of the hotel room. The tax is imposed on the hotel guests, not on the hotels. The hotels simply collect the tax from the guests and transmit the collected taxes to the City.

Petitioners are all members of an association of hotel and motel owners. The association has filed a series of lawsuits against the City seeking to invalidate the tax. The association has had a few procedural victories, all of which simply resulted in minor changes to the wording of the City's ordinances. As a practical matter, the tax has been imposed on hotel guests and collected by hotels during this entire process. The history is:

State court litigation

1. The association filed suit in state court challenging the City's ordinances. The trial court ruled in the City's favor, but in 1997 the court of appeal found the definitions in the ordinance defining the persons to whom it applies too vague, and in a published opinion held the tax invalid as a result. *City of San Bernardino Hotel/Motel Association v. City of San Bernardino*, 59 Cal.App.4th 237 (1997). The court of appeal expressly rejected a request for a permanent injunction because the definitions could simply be amended. "The city is free to try again, with appropriate modifications to the definitional and other sections of the ordinance."

2. In response to the court of appeal opinion, the City promptly enacted a revised ordinance with revised

definitions. The association filed another lawsuit challenging the revised ordinance. The trial court sustained a demurrer without leave to amend. In 2000 the court of appeal affirmed on the grounds addressed by the trial court, but remanded with directions to allow an amendment to raise additional challenges to the revised ordinance based on the new definitions. *City of San Bernardino Hotel/Motel Association v. City of San Bernardino*, case no. E025364.

3. Without waiting for remand, the City enacted a second revised ordinance which revised the definitions the court of appeal indicated were questionable. The association sought both an injunction against the current ordinance and refunds under the prior two ordinances. The trial court granted judgment in the City's favor in 2004. In 2005 the court of appeal affirmed; the details of its opinion are addressed below. The state court litigation is now final.

Federal court proceedings

1. Following the published California court of appeal decision, petitioners filed suit in federal court seeking damages. The district court granted a motion to dismiss. (Appendix "D" to the petition) The Ninth Circuit, in a published opinion, affirmed the dismissal to the extent petitioners sought damages based on future collection of taxes under the City's ordinances and to the extent they sought a refund of taxes paid prior to the court of appeal opinion. However, it remanded for a determination of whether the City had collected taxes under the invalidated ordinance after it had been found invalid. (Appendix "C" to the petition)

2. On remand, the City moved for summary judgment based on undisputed evidence that the City had never collected any taxes under the original ordinance after it had

been declared invalid by the state court of appeal. The district court granted summary judgment. (Appendix "B" to the petition) The Ninth Circuit affirmed that decision in 2006. (Appendix "A" to the petition)

III

PETITIONERS LACK STANDING AND THIS PETITION IS MOOT: A STATE COURT ADJUDICATED THAT PETITIONERS NEVER PAID ANY TAXES

The petition takes the position that petitioners are entitled to damages based on taxes they paid. Petitioners completely ignore a final state court judgment which adjudicated that there are no damages to recover because petitioners never paid a dime in taxes. The final adjudication that no taxes were paid makes arguments about what remedies should be available if taxes had been paid entirely moot, and deprives petitioners of standing to sue.

Petitioners own or operate hotels and motels. Each version of the City's ordinance imposes the tax on hotel guests, not on the hotels themselves. The hotels are required to collect taxes from hotel guests, but the tax is paid by the hotel guests.

Petitioners are members of the association which has been challenging the tax in state court. "All the plaintiffs in the instant action are members of the Association and were members during the course of the prior litigation before the California courts." (Appendix "D," page 25a) In 2004 a California trial court granted summary judgment in the lawsuit brought by the association of which petitioners are members based on undisputed evidence that the association's members never paid a dime in taxes or penalties and thus

there were no taxes to refund to them.

In 2005 the California court of appeal for the Fourth District, Division Two affirmed that decision. *City of San Bernardino Hotel/Motel Association v. City of San Bernardino*, E037069, 2005 Cal.App.Unpub. Lexis 11114. It addressed the tax and the penalty provisions separately, and found no basis for a refund under either provision because the association's members never paid any taxes or any penalties.

> "Generally, persons who have not paid the tax in question are barred from bringing suits for refund of that tax. [Citation.]" [Citation] . . . Here, under the former tax ordinance, the tax was payable by the "transient." (Former San Bernardino Mun. Code, § 3.54.020.A.) The hotel operator was responsible for collecting the tax from the transient and remitting it to the City. (Former San Bernardino Mun. Code, §§ 3.54.030, 3.54.040, 3.54.075.) The trial court therefore ruled that the Association and its members had no standing to sue for a refund of the tax.
>
> However, if an operator "failed or refused to collect the tax and to make . . . any report and remittance of the tax or any portion thereof," the operator became personally obligated to pay the tax. (Former San Bernardino Mun. Code, §§ 3.54.060.A, 3.54.130.B.) Moreover, the former tax statute specifically allowed an operator to claim a refund, at least when "the person from whom the tax was collected was not a transient . . . ." (Former San Bernardino Mun. Code, §§ 3.54.033.B.) In our previous opinion, we held that an operator could also claim a refund under other circumstances, provided the operator (rather than the transient) had actually paid the tax, and further provided the denial of a refund would violate due

process. (E025364, supra, [at pp. 8-9].) The Association therefore argues that its members were taxpayers and do have standing to sue for a refund.

The key case, which the trial court found to be controlling, is *Scol Corp. v. City of Los Angeles* (1970) 12 Cal. App. 3d 805, 91 Cal. Rptr. 67. There, a city imposed a "tipplers' tax" on purchasers of alcoholic beverages, and it required retailers of alcoholic beverages to collect the tax. (Id. at p. 808-809 & 809, fn. 2.) The tax was eventually struck down as preempted by federal law. (Id. at p. 808)

In February 1969, Scol, a retailer, did not collect the tax from its customers; nevertheless, it paid $ 320, the amount of the tax it should have collected. At other times, it did collect the tax from its customers and did pay it over to the city. (*Scol Corp. v. City of Los Angeles*, supra, 12 Cal. App. 3d at p. 810.) Scol then filed suit seeking a declaration that the city was a constructive trustee of all the tax money, plus a refund of the $ 320. (Id. at p. 808.)

The appellate court held that Scol lacked standing, for two reasons. First, with respect to the money Scol had collected from its customers, the customers were the taxpayers, not Scol. [Citation] Second, "in making the payment of $320 . . ., Scol did not pay taxes collected by it; rather, Scol paid the monetary equivalent of those taxes in order to avoid possible further liability for its default in the performance of its duty to collect those taxes." [Citation]

With respect to taxes that members of the Association collected from their customers, *Scol* is on point. Although we may assume, without deciding, that

the Association has standing to assert its members' rights to a refund [citation], as to these particular taxes, its members *have no such right.*

With respect to taxes for which members of the Association became individually liable, however, *Scol* is not controlling. In *Scol*, the $ 320 does not appear to have been a penalty the tax ordinance actually required Scol to pay: the court noted that Scol paid it to avoid unspecified "further liability"; it also distinguished the $ 320 from the "payments, required by the ordinance," of the money Scol actually collected from customers. [Citation] Thus, we do not understand the opinion to mean that, even if Scol had not paid the $320 tax imposed on its customers, and even if, as a result, it had had to pay a penalty imposed on it directly, it would not have had standing to seek a refund. Otherwise, no one would ever have standing to challenge a penalty imposed for failure to collect a tax -- not even when the law imposing both the penalty and the tax is void.

We therefore agree -- at least in principle -- that an operator would have standing to sue for a refund of any payments it actually made for which it was personally liable under the former tax ordinance. The complaint, however, never alleges that any member of the Association ever paid so much as a penny under the former tax ordinance. Thus, the complaint fails to allege that the Association has standing to seek a refund. [Footnote]

The adjudication that petitioners never paid any taxes deprives them of standing to sue and makes issues about potential remedies moot.

IV

NO EXTRAORDINARY REASONS MERIT REVIEW OF A DECISION FROM 2002

The deadline for seeking review of an appellate court decision is 90 days after the decision. This petition is based entirely on a decision entered in 2002.

In the interests of complete resolution of the issues presented by a timely petition, this Court has the power to consider issues addressed in a prior appeal. However, the present petition does not ask this Court to address a few issues from a prior appeal in the process of resolving the issues presented by the recent Ninth Circuit decision; rather, it is expressly limited to issues resolved in the 2002 Ninth Circuit decision.

In a truly extraordinary case, this Court has the discretion to grant a petition limited to issues decided in an appellate case decided several years ago. But this is not an extraordinary case and the petition suggests no reasons why this Court should exercise its discretion to hear issues decided and resolved in 2002.

V

THE 2002 NINTH CIRCUIT DECISION WAS CORRECT

A. BACKGROUND LAW

The Tax Injunction Act, 28 U.S.C. § 1341, provides that federal district courts may not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law

where a plain, speedy and efficient remedy may be had in the courts of such State." Petitioners do not dispute that California law provides a plain, speedy and efficient remedy.[1]

The 2002 Ninth Circuit decision was based on this Court's decisions in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), and *National Private Truck Council v. Oklahoma Tax Council*, 515 U.S. 582 (1995). In *Fair Assessment* this Court traced the long and consistent policy that federal courts will not interfere with state tax systems as long as state law provides adequate remedies.

> This Court, even before the enactment of § 1983, recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems. . . . After this Court conclusively decided that federal courts may enjoin state officers from enforcing an unconstitutional state law [citation], Congress also recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts. Thus, in 1937 Congress provided:
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> > "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341 (hereinafter § 1341 or Act).

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[1]The City's ordinances themselves provide admininistrate procedures for seeking either refunds of taxes or credits against future taxes, and California law provides simple procedures for seeking refunds.

> This legislation, and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to "Our Federalism," particularly in the area of state taxation. [Citation] Even after enactment of § 1341 it was upon this comity that we relied in holding that federal courts, in exercising the discretion that attends requests for equitable relief, may not even render declaratory judgments as to the constitutionality of state tax laws. [Citation] 454 U.S. at 102-103.

The Court held that this same policy applies to actions under § 1983 seeking damages based on state tax systems.

> As indicated by our discussion in Part I, § 1341 and our comity cases have thus far barred federal courts from granting injunctive and declaratory relief in state tax cases. Because we decide today that the principle of comity bars federal courts from granting damages relief in such cases, we do not decide whether that Act, standing alone, would require such a result. [Footnote] The correctness of the result in this case is demonstrated by an examination of the pre-Act decisions of this Court, the legislative history of the Act, our post-Act decision in the *Great Lakes* case, and more recent recognition of the principles of federalism.
>
> . . .
>
> In arguments primarily addressed to the applicability of the Act, petitioners contend that damages actions are inherently less disruptive of state tax systems than injunctions or declaratory judgments, and therefore should not be barred by prior decisions of this Court. Petitioners emphasize that their § 1983 claim seeks recovery from individual state officers, not from state coffers, and that the doctrine of qualified immunity will protect such officers' good-faith actions and will thus

avoid chilling their administration of the Missouri tax scheme.

We disagree. Petitioners will not recover damages under § 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity. [Footnote] Moreover, the intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, 365 U.S. 167 (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

. . .

This case is therefore controlled by principles articulated even before enactment of § 1983 and followed in later decisions such as *Matthews* and *Great Lakes*. The recovery of damages under the Civil Rights Act first requires a "declaration" or determination of the unconstitutionality of a state tax scheme that would halt its operation. And damages actions, no less than actions for an injunction, would hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim. We consider such interference to be contrary to "[the] scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." [Citation]

Therefore, despite the ready access to federal courts provided by *Monroe* and its progeny, we hold that taxpayers are barred by the principle of comity from

> asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete [footnote], and may ultimately seek review of the state decisions in this Court. [Citations] 454 U.S. at 107, 113, 115-116.

In *National Private Truck Council*, a state court found a tax invalid and ordered refunds. The plaintiffs also wanted a state court decision that the tax violated federal law so they could obtain an award of attorney's fees under 42 U.S.C. § 1988. The state court rejected that contention and this Court affirmed. In the process it again emphasized the strong policy against federal interference with state court tax systems.

B. THE NINTH CIRCUIT DECISION

The 2002 Ninth Circuit decision divided the case into three portions. First, to the extent petitioners sought damages based on the revised version of the ordinance in effect following the 1997 California court of appeal decision, it held that federal jurisdiction does not lie because it is impossible to award damages without first addressing the validity of the tax itself, which is precisely what the Tax Injunction Act precludes.

> In *Fair Assessment in Real Estate Ass'n v. McNary*, the Supreme Court extended the principles of comity and federalism underlying the Tax Injunction Act to prohibit an award of damages under § 1983. The Court recognized that federal courts generally must abstain from suits that would intrude into the administration of state taxation:

> Petitioners will not recover damages under § 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity.

454 U.S. at 113. Thus, taxpayers are barred "from asserting § 1983 actions against the validity of state tax systems in federal courts" as long as they had an adequate remedy available in state court. Id. at 116. See also Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 588-92, 132 L. Ed. 2d 509, 115 S. Ct. 2351 (1995) (holding that state courts cannot award declaratory or injunctive relief under § 1983 if the taxpayer has an adequate remedy under state law).

Petitioners do not challenge that portion of the opinion.

Second, to the extent, if any, that the City continued to collect taxes after the California court of appeal found the ordinances invalid, it allowed the suit to proceed. As indicated above, the district court later granted summary judgment based on undisputed evidence that this never occurred, and in 2006 the Ninth Circuit affirmed. Petitioners do not challenge the district court adjudication or the 2006 Ninth Circuit decision.

Third, to the extent petitioners sought a refund of taxes collected prior to the California court of appeal opinion, the Ninth Circuit held that the Tax Injunction Act precludes that type of lawsuit.

On the balance, however, we believe allowing damages would significantly intrude into the smooth functioning of the city's tax system. See *Tomaiolo v. Mallinoff*, 281 F.3d 1, 8 (1st Cir. 2002) (noting that although allowing a suit might be less disruptive because the city had stopped collecting the tax, "any such difference would not be so great as to justify recognizing an exception to Fair Assessment"); see also *Jerron West, Inc. v. Cal. State Bd. of Equalization*, 129 F.3d 1334, 1337 (9th Cir. 1997) (noting that the Tax Injunction Act prohibits "even an indirect restraint on tax assessment"). Although the state courts declared the tax facially unconstitutional, they did not consider whether the plaintiffs had been injured. Before a federal court awarded damages, it would have to determine whether plaintiffs suffered cognizable injury and the extent of that injury.[2] Further, allowing damages under § 1983 could expose cities and states to substantial tort liability, such as the $1 million sought here, above and beyond any claim that the actual taxpayers have for a refund.

Allowing the plaintiffs to proceed would create a bypass around the broad prohibitions of *Fair Assessment* and *National Private Truck*. In *National*

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[2]The footnote to the opinion stated: "The plaintiffs were not the actual taxpayers; they merely collected taxes from their hotel guests and remitted them to the city. At oral argument, plaintiffs stated they are not seeking a tax refund, but are instead seeking damages under a "theft of services" theory -- that the city required them to expend their time and effort to collect and account for an illegal tax. We assume, without deciding, that this presents a valid basis for damages under § 1983."

Private Truck, 515 U.S. at 585, 588-92, the Court held that the state courts could not award relief under § 1983, even though those courts had determined the tax was invalid under state law.[3] If the plaintiffs in this case were allowed to maintain their suit, they could accomplish through two suits -- a declaratory judgment action in state court and then a damages action in federal court -- what they could not do through a single action in state court for declaratory and monetary relief. Read together, *Fair Assessment* and *National Private Truck* bar use of § 1983 to litigate state tax disputes in either state or federal court. Given the "strong background principle against federal interference with state taxation," *Nat'l Private Truck*, 515 U.S. at 589, we will not carve out a new exception here, particularly one that would offend principles of comity by encouraging bifurcated litigation between state and federal courts. We hold that the plaintiffs may not proceed under § 1983 so long as a "plain, speedy and efficient" remedy is available in state court.

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[3]The footnote to the opinion stated: "Although the only question expressly addressed in the *National Private Truck* opinion was whether the plaintiffs could obtain equitable remedies under § 1983 in state court, its rationale applies with equal force to a claim for damages under § 1983. See *Gen. Motors Corp. v. City and County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal.Rptr.2d 544, 550 (Cal. Ct. App. 1999) ("While the high court has not expressly foreclosed the section 1983 action [for damages in state court] . . ., its interpretation of section 1983 compels the foreclosure.")."

C. THE 2002 NINTH CIRCUIT DECISION WAS CORRECT

Petitioners do not dispute that a single federal lawsuit seeking damages based on the ordinance would have been precluded by this Court's holding in *Fair Assessment.* Petitioners contend *Fair Assessment* can be circumvented simply by splitting every lawsuit challenging a state or local tax system into two pieces: one lawsuit in state court seeking declaratory relief and then a second lawsuit in federal court seeking damages and attorney's fees. In short, petitioners contend federal lawsuits seeking damages based on state and local tax systems should be the norm, and contend federal courts should administer state tax refund procedures.

The proposal to split all litigation concerning state and local tax systems into two pieces, with all refund and damages issues litigated in federal courts, would cause precisely the interference with state and local tax systems addressed by this Court in *Fair Assessment* and *National Private Truck Council.* The 2002 Ninth Circuit decision properly held that the Tax Injunction Act and this Court's decisions cannot be circumvented by such a transparent ploy.

As a practical matter, the sole issue presented by this petition is attorney's fees. Again, there is no dispute that California law provides adequate procedures for refunds to those who actually paid taxes. The sole reason petitioners want a federal remedy is the possibility of an award of attorney's fees under 42 U.S.C. § 1988. But this Court's decision in *National Private Trucking Council* squarely addressed that question and found no need for a federal remedy just to provide a potential for seeking attorney's fees when state law already provides fully adequate remedies for seeking refunds. The petition never suggests any basis for distinguishing *National Private Trucking Council.*

D. THE PROPOSED RULE IS EXTREMELY POOR PUBLIC POLICY

Petitioners effectively ask this Court to rule that every challenge to a state or local tax should proceed in two phases:

1. A declaratory relief phase in state court in which the validity of the tax is decided.

2. A damages phase in federal court in which all issues concerning claims for refunds are decided.

The proposed rule would put the federal courts in the business of administering refund claims based on state and local taxes. That would require federal courts to micromanage state and local tax systems and would create precisely the interference with state and local taxation this Court's decisions and the Tax Injunction Act were intended to prevent.

The proposed rule would also bypass administrative refund procedures. State law generally requires resort to administrative procedures before a party can litigate tax refund claims in court, but federal law has no such requirement. Most tax refund claims are small, and the costs of going to federal court to seek a refund would often greatly exceed the amounts at issue. In the present case, for example, the tax is 10% of the cost of a stay in a hotel. If a guest stays a single night in a room priced at $50.00, the tax at issue is only $5.00. Administrative procedures are a quick and efficient means of addressing small refund claims. The proposal to bypass administrative procedures and to shift such refund claims to federal court, solely to create the possibility of an award of attorney's fees, would benefit no one but lawyers, and would do so at substantial cost to the public treasury.

The proposed rule would also create extensive satellite litigation in federal courts over small amounts of money. For example, one common administrative means for resolving tax refund claims is to credit past taxes paid against taxes owed but not yet paid for a later time period. If a taxing authority were faced with a refund claim in federal court, it reasonably would assert taxes currently owed as an offset against such a refund claim. A federal court could not issue judgments where offsets are asserted without also adjudicating the amount of taxes owed for the later time period. This would put federal courts in the business of deciding the exact amounts of property taxes owed (potentially including issues about valuation and assessment, whether the property has the proper amount of square footage and improvements listed in the taxing authority's records, and the like), the exact amounts of taxes on telephone and other utility bills owed (potentially including issues about whether those bills are accurate), whether late fees and penalties were properly assessed, etc. All of this would create undue interference with state and local tax systems and would clog the federal courts with numerous disputes within small claims court jurisdiction. This again is precisely what this Court's decisions and the Tax Injunction Act were intended to avoid.

VI

THERE IS NO DISPUTE TO RESOLVE

This Court normally grants certiorari either to resolve disputes among the lower courts or to address important and unsettled questions of national significance. Neither situation is presented here. The petition never mentions any dispute among any lower courts. That is because every lower court to address this issue has reached the same conclusion. See, e.g., *Tomaiolo v. Mallinoff*, 281 F.3d 1, 8 (1st Cir. 2002); *Gass v. County of Allegheny*, 371 F.3d 134, 136-137 (3rd Cir.

2004), cert. den., 543 U.S. 987 (2004); *Indian Creek Monument Sales v. Adkins,* 301 F.Supp.2d 555, 562 (W.D. Va. 2004). The question of whether those seeking refunds of taxes should be entitled to apply for attorney's fees is hardly a matter of overwhelming national significance, and at any rate, that question was resolved in 1995 in *National Private Trucking Council.* There simply are no issues this Court needs to address.

VII

CONCLUSION

This petition is moot and petitioners lack standing to sue because they seek damages based on taxes petitioners never paid. If petitioners had paid taxes, California law provides ample remedies for refunds. The Ninth Circuit properly ruled that suit in federal court cannot be maintained just to provide a vehicle for seeking attorney's fees. For all the foregoing reasons it is respectfully submitted that the petition should be denied.

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